UNITED STATES
v.
THE AMERICAN FLUORSPAR GROUP, INC.

IBLA 75-225 Decided June 7, 1976

Appeal from a decision by Administrative Law Judge Robert W. Mesch declaring five mining claims invalid (Contest N.M. 289).

Affirmed.

1. Mining Claims: Contests--Mining Claims: Determination
Determination of Validity--Res Judicata

A civil action in a federal district court condemning a mining claim for a period of years for the exclusive use of the United States does not bar a subsequent contest by the Department of the Interior challenging the validity of the claim.

2. Mining Claims: Discovery: Generally--Mining Claims: Lode Claims

As a prerequisite for the validity of a lode mining claim, there must be found within the limits of the claim a vein or lode of quartz, or other rock in place, bearing mineral of such quantity and quality that a prudent person would expend his time and means with a reasonable prospect of success in developing a valuable mine. Evidence which merely shows that further exploration is needed to "discover" the valuable mineral deposit does not meet the prudent man test.

3. Mining Claims: Discovery: Geologic Inference

> Geological inferences may not alone be used to establish a discovery of a valuable mineral deposit, but if there is a showing of sufficient mineralization and there is satisfactory evidence to support such inferences, they may be used as a basis for estimating the probable extent and value of the mineral deposit.

APPEARANCES: Thomas M. Thompson, Esq., Chase & Thompson, Albuquerque, New Mexico, and Dahl L. Harris, Esq., Albuquerque, New Mexico, for appellants;
Gayle E. Manges, Esq., Field Solicitor, Department of the Interior, Santa Fe, New Mexico, for appellee.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

The American Fluorspar Group, Inc. (appellant), has appealed from a decision of Administrative Law Judge Robert W. Mesch, dated October 15, 1974, declaring the following lode mining claims invalid: the American Fluorspar Nos. 1 and 2; the Sentinel Nos. 1 and 2; and the American No. 5. The claims are in sections 13 and 24, T. 15 S., R. 3 E., N.M.P.M., New Mexico, and cover approximately 100 acres in the White Sands Missile Range.

Judge Mesch held the claims were void because they were not perfected by a discovery of a valuable mineral deposit in 1951 when the land was withdrawn from the operation of the mining laws by Public Land Order 703, 16 F.R. 2440 (March 8, 1951), and they are not presently supported by a discovery of a valuable mineral deposit. He also ruled that the Department of the Interior was not barred from litigating the validity of the claims by a judgment in a prior condemnation action for a year-by-year leasehold interest in the claims.

The appellant contends Judge Mesch's decision is not supported by the facts or the law. It urges that the decision should be reversed either because the Department has no jurisdiction over the case because of the condemnation action, or because the weight of the evidence shows that it had made a discovery on the claims in 1951 and has now made a discovery. The claims are allegedly valuable for fluorspar and barite, and some lead.

I. BACKGROUND

The claims were located and recorded between 1942 and 1946. Through a Petition for Condemnation filed on October 4, 1945, the United States took exclusive possession of these claims (except for the American No. 5 which was not located until 1946) and other lands, including patented claims, for a term of years ending June 30, 1946, extendible for yearly periods during the duration of the national emergency. On June 30, 1947, the United States filed an amended petition of condemnation changing the occupation

from full and exclusive use occupation to joint use, with exclusive use by the United States only when it wanted to use the missile range for test firing.

The joint use of the mining claims continued until February 9, 1951, when the United States again took exclusive possession. In February 1953, a trial was held in the United States District Court for the District of New Mexico. The Court found the owner of the mining claims was entitled to rent for the use and occupancy of the claims by the United States. After describing the claims as "valid unpatented mining claims," the Court determined that a $ 901.50 balance of unpaid rental existed from past use and that the fair rental value of each of the five claims in the future was $ 100 per year. The United States received the right to renew the condemnation for yearly periods for the next 20 years. United States v. Certain Mining Claims located in Socorro, Dona Ana, Lincoln and Otero Counties, Civil No. 946 (D. N.M., March 6, 1953).

On June 28, 1971, the United States filed a new condemnation action in the United States District Court for the District of New Mexico seeking exclusive occupation of the claims for a term of years beginning July 31, 1971, and ending June 30, 1972, and extendible for yearly periods thereafter at the election of the United States until June 30, 1981. United States v. 397.70 Acres of Land, Civil No. 8987 (D. N.M., filed June 28, 1971).

On March 22, 1972, the United States moved the Court for an order suspending the determination of the issue of just compensation until the question of the validity of the mining claims could be determined by proper administrative proceedings. The contestee responded to the motion asserting that the validity of the claims had been determined in the prior condemnation proceeding. On July 6, 1972, the Court issued an order stating:

> * * * the Court having considered the briefs and arguments of counsel and having concluded that the motion is well taken and should be granted; Now, Therefore,
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> IT IS BY THE COURT ORDERED that the Motion of the plaintiff be, and hereby is, granted and the determination of the issue of just compensation for the taking of the above-mentioned unpatented mining claims be, and hereby is, suspended until the question of the validity of said unpatented mining claims has been determined by proper administrative proceedings in the Bureau of Land Management of the Department of the Interior.

On May 15, 1973, the Bureau of Land Management (BLM) filed contest complaint NM 289 charging that valuable mineral deposits constituting a discovery did not exist on the claims on March 8, 1951, or at the present time.

II. JURISDICTION OF THE DEPARTMENT TO DETERMINE VALIDITY OF THE MINING CLAIMS

[1] Appellant contends that the 1953 judgment bars BLM from contesting the validity of the claims as of 1951 or now. It states that once any fact, right, or matter in issue directly adjudicated or necessarily involved in a determination of an action by a competent court has been decided on the merits, the matters determined by the judgment cannot be relitigated by the parties. It states that this rule applies even when a different demand for relief is requested in the second suit. It urges that because the conditions on the claims have not changed, the statement in the 1953 judgment that the claims involved here are "valid unpatented mining claims" binds the Government. We conclude the 1953 judgment does not bar a contest proceeding challenging the validity of the mining claims at the time of the hearing in this proceeding. 1/ Cf. United States v. Johnson, 23 IBLA 349 (1976).

The Department of the Interior has been granted plenary power to administer public lands, and until the issuance of a patent, legal title to a mining claim remains in the United States. Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336 (1963); Cameron v. United States, 252 U.S. 450, 460 (1920). A mining claimant who does not apply for a patent does not lose his claim, but takes a chance that the claim may become invalid. Best v. Humboldt Placer Mining Co., supra at 336. Even a determination that a claim was valid at one time is no bar to a subsequent determination of invalidity if warranted by the facts. United States v. Martin, 9 IBLA 236, 241 (1973); United States v. Ideal Cement Co., 5 IBLA 235, 240, 79 I.D. 117, 120 (1972), aff'd., Ideal Basic Industries, Inc. v. Morton, Civil No. J-12-72 (D. Alas., February 25, 1974), appeal filed, No. 74-2298, 9th Cir., June 3, 1974. A condemnation suit is even a lesser bar to a redetermination than a prior contest proceeding. See United States v. Johnson, supra; United States v. Fleming, 20 IBLA 83 (1975); United States v. Martin, supra.

The reasoning of the court in United States v. Johnson, 420 F.2d 955, 956 (9th Cir. 1970), helps demonstrate why a prior

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1/ Because we find that the preponderance of the evidence in the record shows the claims were invalid at the time of the hearing, we do not reach the issue of whether the 1953 judgment precludes an inquiry into the validity of the claims on March 3, 1951, where the judgment describes the claims as "valid unpatented mining claims."

determination that a mining claim is valid (assuming, arguendo, that the condemnation proceeding here determined that question) is not necessarily a bar to a subsequent redetermination:

> The government contends, and we believe correctly, that the doctrine of res judicata is inapplicable in a situation involving successive condemnation proceedings, each taking the property for a term of years. Granted, the doctrine dictates that a valid judgment, rendered on the merits, is an absolute bar to a subsequent action between the same parties or their privies, upon the same cause of action. However, the successive proceedings here under consideration were not based on the same cause of action.
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> The causes of action were different because the term of each taking was for a different period in time. A condemnation of land --and the accompanying determination of fair rental value--for a term from July 1, 1953, to July 1, 1960, is not based on the same cause of action as a condemnation of the same land for a term from July 1, 1960, to July 1, 1965.

Similarly, the present litigation challenged the validity of the claim more than 20 years after the condemnation action: the market price of the minerals has changed; labor and capital costs have changed; and transportation costs and routes have been altered. Therefore, the present suit is, under the rationale expressed in the above quotation, a different cause of action than the condemnation suit. (Again, this conclusion presumes that the issue of the validity was placed in issue and decided in the 1953 condemnation action, an assumption which the record does not clearly support.) We conclude that a civil action in a federal district court condemning a mining claim for a period of years for the exclusive use of the United States does not bar a subsequent contest by the Department challenging the validity of the claim.

We also note that in Best v. Humboldt, supra, the Supreme Court specifically approved a decision by a district court suspending action on a condemnation suit until after the Department of the Interior determined the validity of a mining claim. The Order of the District Court of July 6, 1972, suspending the issue of compensation pending a determination by the Department on the validity of the claims, recognized that the prior suit was no bar to a redetermination, and the Departmental action in bringing the contest was proper. In any event, the District Court's Order for administrative proceedings to determine the validity of the claims is binding on the Department.

III. VALIDITY OF THE MINING CLAIMS

[2] As a prerequisite for the validity of a lode mining claim located under 30 U.S.C. § 22 et seq. (1970), there must be found within the limits of the claim a vein or lode of quartz, or other rock in place, bearing
mineral of such quantity and quality that a prudent person would expend his time and means with a reasonable prospect of success in developing a valuable mine. E.g., Converse v. Udall, 399 F.2d 616, 621 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969); United States v. Martin, A-31050 (April 3, 1970); United States v. Iron Clad Mining Co., A-28655 (September 14, 1961); Jefferson-Montana Copper Mines Co., 41 L.D. 320 (1912). See United States v. Coleman, 393 U.S. 599, 602 (1968). The claimant must be able to show that the minerals on the claim can be removed, extracted and marketed at a profit. United States v. Coleman, supra; Converse v. Udall, supra. Evidence which shows that further exploration is needed to "discover" the valuable mineral deposit does not meet the prudent man test. Henault Mining Co. v. Tysk, 419 F.2d 766 (9th Cir. 1969); Converse v. Udall, supra; United States v. Martin, supra. The Government by practice has assumed the burden of presenting a prima facie case on the issues presented in the contest complaint, although the claimant bears the risk of nonpersuasion on each issue on which a prima facie case has been made. E.g., Springer v. United States, 491 F.2d 239, 242 (9th Cir.), cert. denied, 419 U.S. 834 (1974); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975).

In applying these principles, Judge Mesch concluded that the United States (contestant) clearly presented a prima facie case of lack of discovery. The contestant's evidence, he stated, "shows that a mineral deposit has not yet been found that has any value for mining purposes, and further, that the claims do not even warrant the expenditure of time and money for prospecting or exploration in an attempt to find a valuable mineral depositc (Decision at 12). He found contestant's evidence more persuasive and reliable than contestee's evidence. However, he stated that even the contestee's evidence did not:

> * * * show that a valuable mineral deposit has been found within the limits of any one of the five mining claims. At best, the evidence simply shows that the claims might warrant the expenditure of time and money in drilling and other exploratory work in an effort to ascertain whether sufficient mineralization of sufficient quality might be found to warrant the development of the property. I do not believe that a person of ordinary prudence would proceed to develop a mine on any one of the five claims on the basis of the evidence

> presented by the contestee. As a very minimum, a prudent person would certainly want to have more specific knowledge with respect to each claim as to (1) the amount or quantity of ore available for extraction, (2) the value or quality of ore to be extracted, and (3) the costs of extracting, processing, and marketing that ore.

(Decision at 17).

The appellant contends that through either error or lack of knowledge, the contestant's witnesses and the decision overestimated the costs of mining the claims and underestimated the potential returns. To support this contention, in its brief to the Administrative Law Judge, it prepared a table estimating potential profits from the claim. According to its calculations, the expected profits, depending upon which assumptions were used, would range from approximately $ 110 per ton to $ 125 per ton. Approximately $ 100 of that expected profit is attributable to sales of specimens of fluorspar to collectors. The Judge found there was no support for the ultimate conclusions of profitability arrived at by these calculations even in the testimony of contestee's own witness. We agree.

The Judge's decision summarizes much of the evidence presented at the hearing. We will discuss the evidence only generally to answer appellant's contentions.

In contending that the Judge's decision is not supported by the weight of the evidence in the record, appellant tries to discredit the testimony of two of contestant's primary witnesses, Luther S. Clemmer and Dr. Vincent Kelly. It attacks Mr. Clemmer for stating that a mill for fluorite would have to be constructed. Appellant asserts that the operators of a mine would ship the ore to an off-site mill to be concentrated for further processing. It contends this and Mr. Clemmer's lack of knowledge concerning available water destroy the credibility of his testimony concerning costs. It is evident that a milling process is necessary to upgrade any fluorite and barite ore on the claims to meet market requirements. There is no satisfactory rebuttal evidence which could establish that the mineral could be economically shipped to a mill for beneficiation and then sold in the market place at a price which would cover the necessary costs for the mining, shipping and milling operations. Obviously, the shipping costs for ore which has not been processed and reduced in volume and weight will be substantially greater than for the milled ore.

Appellant attacks Dr. Kelly for his statements that there was nothing worthy to sample on the claims as being inconsistent with

Mr. Clemmer's testimony that there are exposures of barite on the American No. 5, the Sentinel No. 1 and No. 2. The import of Dr. Kelly's testimony, however, was to the effect that visual observation was all that was needed to give an opinion as to the value of the exposed mineralization, which he did not consider sufficient to warrant development for mining purposes. Appellant also attacks Dr. Kelly's theory of the deposition of the minerals as being different from all other witnesses. It contends this makes a difference in the quantity of mineral that may be within the claims. We need not elaborate or compare these theories because all of the witnesses, including those of contestee, were in basic agreement that a mining operation would not be warranted on the claims without further exploratory work to ascertain whether the exposed surface mineralization extended farther in depth. It is evident from all of the testimony that the exposures showed only some shallow beds of mineralized material. Whether there would be further beds of mineralization beneath limestone beds in an erratic joint system interlocking the five claims, as opined by contestee's witness, Dale Carlson, or whether the shallow surface showings were the extent of the mineralization, could not reasonably be predicted based on the showings made. (See, e.g., Tr. 24, 71-72, 79-80, 189-95, 201-02, 356).

[3] Appellant makes much of the fact that some mineralization has been exposed with tonnage estimates of up to 400 tons to support his contention that more mineralization occurs within the claims. It may well be in a given case that such an exposure might be sufficient if there is satisfactory additional evidence which would support geological inferences that the deposit would be more extensive and sufficient to warrant the cost of mining operations. Geological inferences may not alone be used to establish a discovery of a valuable mineral deposit; but if there are showings of sufficient mineralization and satisfactory evidence to support the inferences, they may be used as a basis for estimating the probable extent and value of the mineral deposit. United States v. Rigg, 16 IBLA 385 (1974); United States v. Relyea, A-30909 (June 25, 1968), aff'd, Relyea v. Udall, Civil No. 3-68-20 (D. Idaho, February 9, 1970); United States v. Watkins, A-30659 (October 19, 1967), aff'd sub nom. Barton v. Morton, 498 F.2d 288 (9th Cir.), cert. denied, 419 U.S. 1021 (1974).

Every case must rest on its own factual basis, however. Here, there are differences in the theories concerning the deposition of the minerals. From the testimony of all the witnesses concerning the geological conditions on the claims, there is as much reason to infer that the mineralization does not extend in depths throughout the claims sufficient to constitute a valuable mineral deposit, as there is to support a contrary inference. There is simply

insufficient factual data from which geological inferences can be made to support an estimate of the possible extent and size of a mineral deposit. Even Mr. Carlson, upon whom contestee most relies in contending there is additional mineralization, was hesitant in his opinion. He did not know whether there were any intrusives from which mineralization would be derived. He recommended drilling on all the claims, to various depths, to ascertain whether the mineralization did occur at depth and, if so, the nature and extent of the occurrence in order to ascertain what type of operation would be most feasible (Tr. 198-203). Both he and another of contestee's witnesses, Natarjan Subramanian, would make an "estimated drilling target" of one million tons of ore (Tr. 203, 401), but it is clear that this target was not an estimated or even probable reserve of ore, but was based upon an assumption of continuous mineralization, which Mr. Carlson testified may not be correct (Tr. 203). He would not even recommend anyone to drive a tunnel and to begin any mining without first drilling the property (Tr. 206, 242-43).

Appellant contends Judge Mesch erred in concluding that contestee's other witnesses were not qualified to testify as to values of mineralization, costs of mining or as to whether a prudent miner would proceed in mining these claims. We have reviewed the testimony of these witnesses and find that although some optimistic opinions have been expressed about the possibility of mining the claims, there is little to support their opinions even if they were considered as qualified experts. In weighing evidence, it is not a quantitative measure of the facts shown and opinions expressed, but a qualitative measure depending upon the probity, reliability, and credibility of the evidence which is most important.

Appellant contends Judge Mesch erred in overlooking the estimates of possible returns from the sale of the crystalline specimens. We need not rule at this time whether the Judge was correct in concluding that such specimens are not subject to location under the mining laws, because he did consider the evidence concerning the specimens and found there was insufficient evidence to support any finding of value for the specimens. We agree. Concerning the mineral specimens, most of the testimony of the witnesses stated that the best visible specimens had been removed from the American Fluorspar No. 1 and that there were no specimens observed on the other claims. Although Mr. Carlson testified there were additional specimens visible in the workings on that claim, he indicated it would take hard work and hard labor to take them out (Tr. 249). He also stated specimens could be removed during actual mining operations for fluorspar and barite but 90 percent of them would be ruined (Tr. 208). In testifying concerning the possible value of the specimens he stated:

> * * * in all fairness here, I think I should interject the fact that you would have to watch saturating the market on things like this and your limit of sales would probably be somewhere in the neighborhood of thirty ($ 30,000) or forty thousand ($ 40,000) a year. Of course, you could stockpile them and sell for a longer period of time.

(Tr. 251).

Judge Mesch found in considering all of Mr. Carlson's testimony that this estimate of value for the specimens was "simply wild speculation" without any support (Decision at 16). The Judge also indicated the estimates were based upon assumptions that the mineralization contains the same type and quality of fluorspar cystals throughout the claims as have been found on the American Fluorspar No. 1 where some good specimens have been found. We agree there is insufficient credible evidence in these regards. There was no realistic geological information which would support Mr. Carlson's conjectures that more crystal specimens could be found. As we have previously indicated, there is insufficient evidence to support geological inferences that any of the mineralization extends farther in depth, and also that mineralization would occur in crystalline form in the other claims and farther in the American Fluorspar No. 1 in the same way as some of it occurred in the American Fluorspar No. 1 surface type of exposures.

In addition to the difficulty in predicting whether these crystalline formations occur to an extent that they could be removed for sale, satisfactory evidence is lacking that the costs of removal--described as a hand operation and hard work by Mr. Carlson--could meet the possible expected returns. Further, Mr. Carlson's statement quoted above reflects the uncertainty of the higher-priced marketplace for specimens. In short, even assuming, arguendo, that we could consider a higher price per-unit value for mineral specimens above the per-unit price for the mineral itself, the evidence fails to establish satisfactorily that there is a sufficient deposit of such specimens which a prudent man could expect to mine profitably.

Thus, while we may not necessarily agree with every statement made by Judge Mesch, we agree with his ultimate finding based upon a weighing of all the evidence in the record that there is insufficient mineralization to meet the prudent man test of discovery. Because of this conclusion, it is unnecessary to discuss appellant's further objections and contentions.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Joan B. Thompson
Administrative Judge

We concur:

Martin Ritvo
Administrative Judge

Frederick Fishman
Administrative Judge